IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 81

NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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The petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, dated the 6th day of December 1962, affirming by a divided court, an order of the United States District Court for the Eastern District of New York, entered on March 19, 1962.

Opinions Below

United States District Court for the Eastern District of New York, Dooling, *J.*, rendered an opinion and order entered in the office of the Clerk of the United States District Court for the Eastern District of New York on March 19, 1962, reported in 30 FRD 3.

United States Court of Appeals for the Second Circuit rendered an opinion dated December 6, 1962, reported in 311 F. 2d 79.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated December 6, 1962, and the mandate entered in the office of the Clerk of United States District Court for the Eastern District of New York on the 27th day of December 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Was valid service of process effected upon the respondents by the service of the summons and complaint upon the person nominated and designated as their process agent in a written contract when actual notice of such service was given by both process agent and petitioner, even though the contract contained no provision requiring such notice.

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment V:

> "* * * nor shall any person * * *, be deprived of life, liberty or property, without due process of law; * * *"

2. Federal Rules of Civil Procedure, Rule 4 (d) (1):

> "(d) Summons: Personal Service * * *. Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Statement

The basis for federal jurisdiction in the Court of first instance is based on diversity of citizenship. Title 28 U.S.C. Section 1332.

Petitioner, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in a written lease agreement. Respondents, residents of Michigan, obtained farm equipment from plaintiff pursuant to such lease, the last paragraph of which read:

> "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

On January 24, 1962, the United States Marshal delivered two copies of the summons and complaint to the respondents' designated agent, Florence Weinberg, who promptly mailed them to respondents with a covering letter explaining that they had been served upon her as the respondents' agent, in accordance with the provisions of the lease. On the same day, petitioner itself notified respondents by certified mail of the service of process on Florence Weinberg.

The District Court, although finding that the clause appointing such agent "was no fine print clause", and "abun-

dant actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to defendants at a glance," nevertheless held service invalid and quashed it on the ground that the lack of provision in the contract that the respondents be notified by the agent, of such service of process, rendered the provision therein, containing the appointment of person on whom process of service was to be served, ineffective.

The Court of Appeals for the Second Circuit, in affirming, determined that a provision for such notice would be essential to the validity of a state statute providing for substituted service on a statutory agent, but conceded that there is no such requirement when individuals freely contract for a method of substituted service.

Reasons for Granting the Writ

As stated by Judge Moore, in his dissenting opinion in the Court below:

> "* * * The Federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. Furthermore, the opinion of the majority would appear to be in conflict with Kenny Construction Co. v. Allen, 248 F. 2d 656 (D. C. Cir. 1957) and Green Mountain College v. Levine, 120 Vt. 332, 139 A. 2d 882 (1958)."

Both the District Court and the Court of Appeals are in agreement that the law is well established that citizens of different states may agree in advance that any dispute arising out of the commercial transaction between them shall be subject to the jurisdiction of the Courts of a designated

state. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 39 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts Sec. 81; Restatement, Judgments Sec. 18; cf *Adams* v. *Saenger*, 303 U. S. 59 (1938).

The contract herein was freely negotiated and executed, is unequivocal in its terms, required no construction and should, therefore, be enforced as executed.

Significantly, the contract provided that it was deemed to have been made in the State of New York and the rights and liabilities of the parties determined in accordance with the laws of the State of New York.

It was, in this connection, that provision was made for authorizing service of process upon a person in the State of New York.

In a recent proceeding in the Supreme Court of the State of New York, involving this petitioner, where an application was made to quash service, the court in *National Equipment Rental, Ltd.* v. *Graphic Art Design*, 234 N. Y. S. 2d 61 at 63, held:

> "Insofar as service of process is concerned, the question has been resolved by this court (Widlitz, J.) in National Equipment Rental, Ltd. v. Boright, N. Y. Law Journal, July 17, 1962, pgs. 8-9 in which, in construing a similar designation of an agent to receive service of process, the court said:
>
> 'The instant situation concerns contractual designation. The propriety of service in accordance

with an advance designation has been upheld in Gilbert v. Burnstine (255 N. Y. 348, 174 N. E. 706, 73 A.L.R. 1453), Emerson Radio & Phonograph Corporation v. Eskind (32 Misc. 2d 1038, 228 N. Y. S. 2d 841), National Equipment Rental, Ltd. v. Karlin (6 Misc. 2d 128, 166 N. Y. S. 2d 27)' Accordingly, to the extent that the motion seeks to set aside service of the summons as insufficient, it is denied.

"* * * Not only was the basic contract made in New York, but the parties stipulated that it should be interpreted and the rights and liabilities of the parties determined in accordance with the Laws of the State of New York, and the contract made provision for acquiring personal jurisdiction of the defendants in New York. Express stipulations in furtherance of business convenience or necessity and voluntarily made should not be lightly disregarded. Consents contained in the basic agreement necessarily implied that New York would be the forum for litigation. The intent of the parties thus expressed or implied will not be frustrated nor the plaintiff's choice of forum disturbed. (* * *)"

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, the Court at 354, held:

"Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. * * *"

The Court, quoting with approval from Scott Fundamentals of Procedures, pages 39-41, held:

> " 'Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising an objection of lack of jurisdiction over him. A stipulation waiving service has the same effect. The defendant may, before suit is brought, give a power of attorney to confess judgment or appoint an agent to accept service, or agree that service by any other method shall be sufficient. The defendant in all these cases has submitted to the control of the State and the Court over him.' "

The requirement by the Court below that the contract incorporate an intrinsic provision for reasonable notification in order to render the designation of agent enforceable, is in direct conflict with *Green Mountain College* v. *Levine*, 139 A. 2d 822, 120 Vt. 332; *Kenny Construction Co.* v. *Allan*, D. C. Cir. 1957, 248 F. 2d 656, in each of which case, the court held that the danger that the agent so designated might not forward notice to the defendants were risks that they took in appointing such agent. At the time of the execution of the contract, the respondents herein did not challenge any of its terms and in fact, had the respondents insisted on the elimination of the clause designating the agent, the petitioner would not have entered into the contract.

This Court in *Upton* v. *Tribilcock*, 91 U. S. 45, the Supreme Court held at page 50:

> "It will not do for a man to enter in a contract, and, when called upon to respond to its obligations to say that he did not read it when he signed, or did not know what it contained. If this were permitted con-

tracts would not be worth the paper on which they are written. Such is not the law. A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission."

In *Hill* v. *Syracuse R. Co.*, 73 N. Y., the Court at 353 held:

"By accepting the contract without objection, the other party had a right to assume that he assented to its terms and the fact of not reading it cannot be interposed to prevent the legal effect of the transaction. Long v. N. Y. C. R. Co., 50 N. Y. 76; Belger v. Dinsmore, 37 N. Y. 166; Steers v. Liverpool etc. S. S. Co., 57 N. Y. 1; Magee v. C & R Tr. Co., 45 N. Y. 514."

In *Chicago R. Co.* v. *Belliwith*, 83 Fed. 437, the Court at 439 stated:

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement?"

The appellant herein relied on all of the terms of the contract, paid its money for equipment specifically requested by appellees and appellees should be bound to all of the terms of the contract.

See also *Angerosa* v. *White Co.*, 290 N. Y. Supp. 204, 248 App. Div. 425, aff'd 275 N. Y. 524; *In re Smith's Estate*, 276 N. Y. Supp. 646, 243 App. Div. 348; *Charles F. Fields, Inc.* v. *American Hydratherm*, 174 N. Y. S. 2d 184, 5 App. Div. 2d 647.

The appellees, therefore, should be held to their contract as executed and service effected upon them should be held valid.

Process was effected exactly as required under Rule 4(d)(1) of the Rules of Civil Procedure. Actual notice of the service was given to the respondents. The effect of the decision of the Court below is to nullify the language of the rule and to deprive the petitioner of due process under the Fifth Amendment of the Constitution. Inasmuch as Rule 4(d)(1) of the Federal Rules of Civil Procedure does not require that the agent be under an obligation to send notice of services of process, an interpretation by the Court that it does require such notice does violence both to the unequivocal provision of the contract between the parties as well as to the letter of the rule.

The results of the construction placed upon this significant paragraph by the Court below was in effect, to make a new contract between the parties. The petitioner herein purchased the equipment leased to the respondents, predicated upon the contract and in reliance upon its ability to obtain jurisdiction over the respondents in Courts in its own local area. It would not have made the contract otherwise. By the construction placed upon the paragraph in question, the Court has effectively deprived the petitioner of its rights under contract without due process of law. Moreover, as pointed out in the dissenting opinion in the Court below:

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend (citing cases). Once it is found that that purpose has been served, the inquiry should come to an end."

In the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735, the Supreme Court held:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The result of the determination by the Court below is, in the words of the opinion of Judge Moore, dissenting therefrom to throw

> "in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty."

Since the contract provides "that the laws of the State of New York are applicable thereto" an examination of the decisions of the highest Court of the State of New York bear examination. They hold that a Court cannot make a new contract for the parties under the guise of interpreting the writing. *Central Union Trust Co.* v. *Trimble*, 255 N. Y. 88, 174 N. E. 72; *Western Union Telegraph Co.* v. *American Comm. Assoc.*, 299 N. Y. 177, 86 N. E. 2d 162.

Only where the language of the contract is ambiguous and uncertain and susceptible of more than one construction may the Court interfere to reach a proper construction of that which is uncertain.

The respondents themselves submitted no affidavits in support of their application to quash service, nor does the record reveal any personal claim on their behalf that they were imposed upon. *Friedman* v. *Handelman*, 300 N. Y. 188, 194, 90 N. E. 2d 31; *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 4, 171 N. E. 884; *Heller* v. *Pope*, 250 N. Y. 132, 164 N. E. 881; *Fleetash Realty Co.* v. *August Severio Construction Co.*, 21 Misc. 2d 350, 188 N. Y. S. 2d 714, 716, aff'd. 11 A. D. 2d 769, 205 N. Y. S. 2d, 212; *Frankel* v. *Tremont Norman Motors Corp.*, 21 Misc. 2d 20, 193 N. Y. S. 2d 722, 725, aff'd. 10 A. D. 2d 680, 197 N. Y. S. 2d 576, aff'd. 8 N. Y. 2d 901, 168 N. E. 2d 823. The Court must construe an agreement as made and may not make a new agreement by construction. *Sandberg* v. *Reilly*, 223 A. D. 57, 227 N. Y. S. 418. Parties may make their own bargains and they should be held to the terms of their agreement. *Cohen* v. *E. & J. Bass*, 246 N. Y. 270, 158 N. E. 618. A poor bargain may not be made good by judicial construction or recasting of the contract since it is a fair and reasonable assumption that a party has made what he believed to be the best bargain which he could obtain in his own interest. *Lexington Holding Corporation* v. *Holman*, 189 N. Y. S. 2d 269, 270. Where the intention of the parties, as in the case at bar, is clear and unambiguously set forth, effect must be given to the intent as indicated by the language used. *Delancy Kosher Restaurant and Caterer Corporation* v. *Gluckstern*, 305 N. Y. 250, 256, 112 N. E. 2d 276. The intention of the parties is found in the language used to express such intention. *Nau* v. *Vulcan Rail & Con-*

struction Co., 286 N. Y. 188, 198, 199, 36 N. E. 2d 106. The agreement of the parties is to be ascertained from the plain language used by them no matter what the intention may have been. Presumptively, the intention of the parties to contract is expressed by the natural and ordinary meaning of their language referable to it and such meaning cannot be perverted or destroyed by the Courts through construction. *Gans* v. *Aetna Life Insurance Co.*, 214 N. Y. 326, 108 N. E. 443. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifested. *Cream of Wheat Co.* v. *Arthur H. Crist Co.*, 222 N. Y. 487, 493, 494, 119 N. E. 74.

If private contracts which are not in conflict with the public policy of the States or National are to be inhibited by judicial construtions, the entire concept of free interstate commerce will be frustrated. The decision of the Court below is a deterrant to interstate commerce.

An additional ground for granting certiorai is that the decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Kenny* v. *Allen, supra,* and with the decision of the highest Court of the State of Vermont in *Green Mountain College* v. *Levine, supra. Patterson* v. *U. S.*, 79 S. Ct. 936, 359 U. S. 495; *Robert C. Herd & Co.* v. *Crawill Machinery Corp.*, 79 S. Ct. 763, 359 U. S. 297; *Mitchell* v. *Kentucky Finance Co.*, 79 S. Ct. 756, 359 U. S. 290; *U. S.* v. *Embassy Restaurant, Inc.*, 79 S. Ct. 554, 359 U. S. 29; *Romero* v. *International Terminal Operating Co.*, 79 S. Ct. 468, 358 U. S. 354.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 21—October Term, 1962

(Argued October 11, 1962 Decided December 6, 1962)

Docket No. 27486

NATIONAL EQUIPMENT RENTAL, LTD.,
Plaintiff-Appellant,

v.

STEVE SZUKHENT and ROBERT SZUKHENT,
Defendants-Appellees.

Before:

CLARK, MOORE and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., quashing service of summons and complaint on non-resident defendants in action on a farm equipment lease.

Affirmed.

WILBUR G. SILVERMAN, Jamaica, New York, *for plaintiff-appellant.*

HARRY R. SCHWARTZ, Brooklyn, New York, *for defendants-appellees.*

SMITH, *Circuit Judge*:

Defendants, residents of Michigan, obtained farm equipment in Michigan on a lease from plaintiff, a Delaware Corporation with its principal place of business in New York. Claiming default, plaintiff sued for payments under the lease in the Eastern District of New York, the marshal delivering two copies of the summons and complaint to one Florence Weinberg as agent designated in the lease for the purpose of accepting process for defendants in the State of New York. The copies were promptly forwarded by Weinberg to defendants by mail with a covering letter under an agreement between Weinberg and plaintiff to perform this service without compensation. Nothing in the lease required notice to defendants. Plaintiff also notified defendants by mail promptly on the purported service of the process. The United States District Court for the Eastern District of New York, John F. Dooling, Jr., D. J., held the service invalid and quashed the service. Plaintiff appeals. We agree with the District Court that no valid agency of Weinberg for defendants was created by the instrument in suit and affirm the order.

The lease contract here was on a printed form provided by plaintiff. There is no requirement in the purported appointment of the agent for any notice to defendants. A provision for notice would be essential to the validity of a state statute providing for substituted service on a statutory "agent". *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). There is no such requirement when individuals freely contract for a method of substituted service. Lack of such a provision in a contract of adhesion, here involved,

may, however, be considered in determining the meaning and effect of the provisions of the contract. There is no provision in the lease for any undertaking by the purported agent to act for, or give notice to her purported principal. Normally, an agency exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act, Restatement Agency § 15, and the agent is subject to control by the principal, Restatement Agency § 1. Plaintiff's affidavits demonstrate that Weinberg was acting under an agreement with and supervision of the plaintiff, having undertaken no obligations to defendants, to whom she was unknown. Defendants never dealt with her and had no indication of any undertaking on her part to act as their agent until receipt of the process many months later. The court properly held such a purported appointment unreal and ineffective to create a genuine agency of Weinberg for defendants.

Plaintiff might have provided, with defendants' agreement, that service or notice be waived or that notice be given by plaintiff. See *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2 Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). This would, however, have required defendants' consent, which might or might not have been forthcoming. The illusory purported agency provision, however, is properly held ineffective to subject defendants to suit in New York.

Affirmed.

MOORE, *Circuit Judge* (dissenting)

The question here presented goes so much beyond the facts of this particular case that I believe my contrary view should be stated. After all, it may be said, who (except this plaintiff, of course) cares whether a Michigan farmer pays for machinery he has leased in New York? However, the federal jurisdiction problem presented here is of the greatest commercial importance to merchants and consumers who engage in interstate business transactions. Furthermore, the opinion of the majority would appear to be in conflict with *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957) and *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 882 (1958).

Plaintiff, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in an instrument denominated a lease. Defendants, residents of Michigan, obtained farm equipment from plaintiff pursuant to such a lease, the last operative clause of which read:

> "* * * and the Lessee hereby designates Florence Weinberg, 47-21 Forty-First Street, Long Island City, New York, as agent for the purpose of accepting service of any process within the State of New York."

Plaintiff, alleging default under the lease, commenced this action in the Eastern District of New York. The Marshal delivered two copies of the summons and complaint to defendants' designated agent, Florence Weinberg, who

promptly mailed them to defendants with a covering letter, explaining that they had been served upon her as the defendants' agent in accordance with the provisions of the lease. On the same day, plaintiff itself notified defendants by certified mail of the service of process on Florence Weinberg. Twenty-two days after this service, counsel for defendants notified plaintiff's attorney that he was appearing specially to set aside the service of the summons and complaint. The District Court held the service invalid and quashed it.

The clause appointing the agent was no fine print clause buried in an oppressively long and complex instrument. The entire contract is only 1¼ pages long and the agency provision is in the last paragraph appearing directly above defendants' signatures. The clause was included in the contract for the purpose of subjecting defendants to suit in the courts[1] in New York and for no other purpose. Without such a clause plaintiff might well have refused to make the contract. To carry a New York obtained judgment to the other forty-nine States for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States.

The trial court found that is was plaintiff's established practice to assure that prompt notice was sent to defendants of any action it brought against them. That citizens of different states may agree in advance that any disputes arising out of a commercial transaction between them shall be subject to the jurisdiction of the courts of a designated

1 Such an agency designation would not subject the defendants to the jurisdiction of the courts of the State of New York. *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154 (App. Div. 1921).

state is well established. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931); Restatement, Conflicts § 81; Restatement, Judgments § 18; *cf Adams* v. *Saenger*, 303 U. S. 59 (1938).

The only question presented by this appeal[2] therefore is whether the service made on Florence Weinberg is service on "an agent authorized by appointment * * * to receive service of process" within the meaning of Rule 4(d) (1) of the Federal Rules of Civil Procedure.[3] The majority's strained serch for the contract's "meaning" and "effect", and their invocation of *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928) to provide the unexpressed intendment of the parties do not obliterate the federal nature[4] of the question being here decided. Although my colleagues do not expressly

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2 Since there was jurisdiction of the present suit solely on the ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, there was, by virtue of § 1391 of the Judicial Code, no want of venue and the district court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. For a similar situation see *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1945).

3 The agency appointment in question was framed to a large extent in the language of that Rule. The Rule, in pertinent part, reads as follows:

> (4) (d) * * * Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint *to an agent authorized by appointment* or by law *to receive service of process*. (Emphasis added.)

4 See *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948).

evince a desire to remove Rule 4(d) (1) from the books entirely, they not only substantially rewrite the Rule but also write for the parties a contract into which they probably never would have entered.

The majority initially concede that the constitutionally dictated requirements of *Wuchter* v. *Pizzuti*, *supra*, do not apply to contracts entered into by individuals. Then, in the guise of construing the contract in question, they read those same requirements into Rule 4(d) (1). That this is the effect of their decision is made clear by their concern that "there is no provision in the lease for any undertaking by the purported agent to * * * give notice to her purported principal." In *Wuchter*, the Supreme Court held invalid the non-resident motorist statute in question because "the statute of New Jersey * * * does not make provision for communication to the proposed defendant." Rule 4(d) (1) is now construed to mean that any agency arrangement that does not impose upon the designated agent a contractually unassailable duty to send notice is not sufficient to subject the appointing party to the personal jurisdiction of the courts of the designated state. The fact that notice was actually given is held to be of no consequence.

The Supreme Court, in *Wuchter*, declared that in those situations in which a State may subject a non-resident individual to the jurisdiction of its courts other than through personal service within the State, due process requires that the statutory scheme provide a means of service reasonably calculated to apprise the defendant of the proceedings against him. Compare *Wuchter*, *supra*, with *Hess* v. *Pawlowski*, 274 U. S. 352 (1927). See *McGee* v. *International*

Life Insurance Co., 355 U. S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). In that case the Court was dealing with the limitations on the coercive powers of the States imposed by the due process clause of the Fourteenth Amendment, and not with arrangements for service of process voluntarily agreed to by individuals. As Cardozo, J., said in related context, "The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 437 (1916). See L. Hand, D. J., in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915). The demise of the implied consent theory serves only to accentuate that distinction, namely, between a voluntary and a forced subjection to the jurisdiction of the courts of a state.

Actual notice by an agent authorized by appointment to receive service of process should be dispositive. The reasoning of Justices Brandeis' and Holmes' dissent in *Wuchter* is, in the context of Rule 4(d) (1), compelling:

> "Notice was in fact given. And it was admitted at the bar that the defendant had, at all times, actual knowledge and the opportunity to defend. The cases cited by the Court as holding that he could deliberately disregard that notice and opportunity and yet insist upon a defect in the statute as drawn, although he was in no way prejudiced thereby, seem hardly reconcilable with a long line of authorities." 276 U. S. at page 28.

To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of form-

alism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Wuchter* v. *Pizzutti*, *supra*; *Grooms* v. *Greyhound Corp.*, 287 F. 2d 95 (6th Cir. 1961); *Tarbox* v. *Walters*, 192 F. Supp. 816 (E. D. Pa. 1961); *American Football League* v. *National Football League*, 27 F. R. D. 264 (D. Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end.

I do not reach the question whether actual receipt of notice by the defendant is always required because here notice was received. If the agent is the nominee of the defendant, plausible argument has been made that service of process is valid even though notice is not forwarded to the defendant. *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D. C. Cir. 1957); *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 822 (1958).

In considering this question, the Vermont court said:

> "The capacity of the Secretary of State to accept the appointment and the danger that he might not forward notice to the defendants were risks which they took in appointing him. Restatement Agency § 21." 120 Vt. at page 336.

Also apropos here are the words of the Supreme Court in the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735 (1877):

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notifica-

tion has been followed, even though he may not have actual notice of them."

The rationale of the majority opinion would, however, extend even to the case posited. They require that the authorization to receive service of process intrinsically provide that the agent be bound to forward notice to the defendant. If, for example, defendants in the present action had selected Florence Weinberg themselves but no consideration ran to her or some other contractual infirmity existed, they would hold that service on her was invalid because she was under no obligation, no binding undertaking, to forward notice. And yet they actually go so far as to concede that a contract providing for no notice at all would have been permissible. Also implicit in the majority opinion is the thought that an appointed agent must be presumed to be faithless to his obligation and that some compensation must be paid by the principal for the services. If these are to be the legal consequences, then precautionary steps should be taken to require that the contract provide for a certificate from the agent is substances as follows: "I, Florence Weinberg, hereby agree for good and valuable consideration by me received from the Lessee, faithfully to perform my agency duties and to forward forthwith by registered mail any papers served on me."

At the heart of the majority opinion there seems to lie a mistrust of the agency provision in question because it might be construed to permit the entry of a default judgment with no notice being provided the defendants.[5] Hard

5 If it should be deemed necessary in this case to engage in contract interpretation, I believe that the far more reasonable and realistic view of this agency provision, in view of the plaintiff's firmly established practice, would be one requiring that notice

cases may make bad law but easy cases, misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.

Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they receive adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court.

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be given the defendants, if not by the agent, then by the principal. See the dissents of Justices Brandeis, Holmes and Stone in *Wuchter* v. *Pizzutti*, 276 U. S. 13, at pages 25 and 28. If proof of such notice were not forthcoming, the service of process would be properly quashed.

The nub of my disagreement with the majority, of course, is they read into Rule 4(d) (1) the requirement that the agent be under an unassailable obligation to send notice, regardless of whether notice is actually sent by the agent, by the plaintiff, or as here, by both.